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No. 95-1193

In the Supreme Court of the United States

OCTOBER TERM, 1995

FRANK SARACO ET AL., PETITIONERS

v.

UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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18 pp

QUESTION PRESENTED

Whether the Tucker Act, 28 U.S.C. 1346(a)(2) and 1491, is the only source of jurisdiction to entertain Fair Labor Standards Act overtime claims against the United States.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 61 F.3d 863. The opinion of the district court (Pet. App. 11a-35a) is reported at 831 F. Supp. 1154.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1995. A petition for rehearing was denied on September 22, 1995. Pet. App. 9a-10a. The Chief Justice extended the time to file a petition for a writ of certiorari to January 11, 1996, and then to January 25, 1996. The petition for a writ of certiorari was filed on January 25, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are six employees of the United States Customs Service (Customs), purporting to sue on behalf of themselves and approximately 800 other individuals who are or have been employed by Customs, either as customs inspectors or as field national import specialists. Petitioners filed a complaint in the United States District Court for the Eastern District of Pennsylvania, raising two claims. In Count I, they alleged that the government had failed to pay them overtime pay at the rate required by the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.* They sought a money judgment, in an unspecified amount, for the unpaid overtime to which they claimed they were entitled, plus liquidated damages, pursuant to 29 U.S.C. 216(b). In Count II, petitioners challenged regulations issued by the Office of Personnel Management (OPM) governing the application to federal employees of the "administrative" exemption from the FLSA overtime provisions, 29 U.S.C. 213(a)(1),[1] to the extent that those regulations define

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[1] Section 213(a)(1) provides, in pertinent part: "The provisions of section[ ] * * * 207 [the overtime provisions] of this title shall not apply with respect to—(1) any employee em-

the exemptions more broadly than do the regulations of the Department of Labor (DOL) concerning non-federal employees.[2]

The government moved to dismiss, or, in the alternative, to transfer Count I to the Court of Federal Claims (CFC) pursuant to 28 U.S.C. 1631. One of the grounds for dismissal, and the ground for the alternative relief of a transfer to the CFC, was that the only source of jurisdiction to entertain FLSA overtime claims against the government is the Tucker Act, and that, because the plaintiffs neither alleged that their claims did not exceed $10,000 nor waived their right to recover more than $10,000, Count I was not within the jurisdiction conferred upon the district court by the Little Tucker Act, 28 U.S.C. 1346(a). The district court agreed. Pet. App. 17a-25a. In addition, the district court concluded that the limited equitable powers conferred upon the CFC by 28 U.S.C. 1491(a)(2) are sufficient to enable the CFC to afford complete relief in this case. Pet. App. 29a-32a. Accordingly, the district court transferred the entire case to the CFC, without reaching other possible grounds for dismissal. *Id.* at 33a.

2. Petitioners appealed the transfer order to the United States Court of Appeals for the Federal Circuit, pursuant to 28 U.S.C. 1292(d)(4)(A). Petitioners challenged the district court's conclusion that it lacked jurisdiction to entertain Count I, but they did not dispute that, if it was correct to transfer Count I, it was correct to transfer Count II as well.

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ployed in a bona fide executive, administrative, or professional capacity * * *."

[2] The Director of OPM is authorized to administer the FLSA with respect to federal employees. See 29 U.S.C. 204(f).

The court of appeals affirmed. Pet. App. 1a-7a. It observed that the district court's jurisdictional holding was compelled by binding Federal Circuit precedent and was not in conflict with decisions of any other circuit. The court of appeals acknowledged that there was a "[d]ivergence of judicial opinion concerning the jurisdiction of monetary claims against the government under various statutes," *id.* at 7a, but noted that there was no such divergence with respect to overtime claims under the FLSA. The court stated:

> [T]he Federal Circuit in *Zumerling v. Devine* [, 769 F.2d 745 (Fed. Cir. 1985),] held that jurisdiction of cases under the FLSA was provided only by the Tucker Act. *Zumerling* states the consistent law of the Federal Circuit. We have come upon no instances of circuit conflict in FLSA actions against the United States. *Zumerling* is in accord with [*United States v.*] *Testan*[, 424 U.S. 392 (1976)] and [*United States v.*] *Mitchell*, [463 U.S. 206 (1983)], and is not inconsistent with *Bowen v. Massachusetts* [487 U.S. 879 (1988)] * * *. It is binding precedent in this court. The district court correctly applied this precedent in transferring the case to the Court of Federal Claims.

Ibid.

ARGUMENT

The decision of the Federal Circuit is correct and does not conflict with any decision of this Court or any other court of appeals. Further review therefore is not warranted.

1. The Federal Circuit correctly held that the only source of jurisdiction to entertain FLSA overtime

claims against the United States is the Tucker Act. Petitioners argue that this ruling is inconsistent with *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988). As the court below observed, however, *Bowen* is quite different from this case. Pet. App. 6a.[3]

Bowen was not a suit for pay or damages, but rather was a suit by a State seeking judicial review pursuant to the Administrative Procedure Act (APA), 5 U.S.C. 702, of a decision of the Secretary of Health and Human Services (HHS) disallowing certain state expenditures for purposes of federal reimbursement pursuant to the Medicaid Act, 42 U.S.C. 1396 *et seq.* The Court held that, although the relief sought might result in the payment of money by HHS to the State, the relief did not constitute "money damages" within the meaning of 5 U.S.C. 702. 487 U.S. at 909-910. The Court stressed that the State's suit was "not a suit seeking money in *compensation* for the damage sustained by the failure of the federal government to pay as mandated * * * ." 487 U.S. at 900 (emphasis in original).

This case, however, *is* such a suit. Petitioners' overtime claims are brought pursuant to 29 U.S.C. 216(b), which provides: "Any employer who *violates* the [maximum hours] provisions of * * * section 207 of this title shall be liable to the employee or employees affected *in the amount of their* * * * *unpaid overtime compensation* * * *, and in an

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[3] The Eleventh Circuit has reached the same conclusion, stating: "[W]e conclude that *Bowen* does not overturn previous authority establishing the Tucker Act as the exclusive jurisdictional basis for FLSA claims against the government." *Parker* v. *King*, 935 F.2d 1174, 1177 (11th Cir. 1991), cert. denied, 505 U.S. 1229 (1992).

additional equal amount as *liquidated damages*" (emphasis added). The remedy described in Section 216(b) is not merely specific relief that happens to be monetary; it is money *damages*. See *Hubbard* v. *Administrator, EPA*, 982 F.2d 531 (D.C. Cir. 1992) (en banc) (back pay claim treated as claim for money damages under *Bowen* analysis). And, as the district court observed, even if petitioners' overtime claims "bear some of the indicia of specific relief, * * * [their] claims for liquidated damages clearly fall outside of the definition of specific relief articulated by the Supreme Court in *Bowen*." Pet. App. 21a.[4]

Petitioners place great stress upon the Court's observation, made in a footnote in *Bowen*, that Tucker Act jurisdiction "is 'exclusive' only to the extent that Congress has not granted any other court authority to hear the claims that may be decided by the Claims Court." 487 U.S. at 910 n.48. Petitioners' invocation of that observation in this case involves a false analogy between the APA and the FLSA. In *Bowen*, there was no question that suits against the United States for judicial review pursuant to the APA are generally maintainable in the district courts. The question was whether suits involving monetary relief fell within an exception to that general rule, *i.e.*, whether the Claims Court's Tucker Act jurisdiction was so exclusive as to limit

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[4] The availability to petitioners of an adequate remedy in the CFC further distinguishes this case from *Bowen*, regardless of whether the relief they seek is characterized as specific relief or damages. As the Court noted in *Bowen*, "suits under the Tucker Act in the Claims Court offer precisely the sort of 'special and adequate review procedures' that [5 U.S.C.] § 704 requires to direct litigation away from the district courts." 487 U.S. at 900-901 n.31.

jurisdiction that Congress had otherwise granted the district courts. Petitioners' argument here proceeds as if there were likewise no question that suits against the United States under the FLSA are maintainable in the district courts. That, however, is the very question presented in this case.

Both the district court and the court of appeals concluded that Congress did not grant any court authority, independent of the Tucker Act, to entertain suits against the United States for overtime pay and liquidated damages under the FLSA. Although the FLSA provides that "[a]n action to recover [overtime pay and liquidated damages] may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction," 29 U.S.C. 216(b), the FLSA does not state *which* court is "of competent jurisdiction" when the employer is the United States. As the Federal Circuit explained in *Zumerling* v. *Devine*, 769 F.2d 745 (Fed. Cir. 1985) (the case upon which the court below relied as controlling), "the words 'of competent jurisdiction' tell us that the words do not stand alone but require one to look elsewhere to find out what court, if any, has jurisdiction." *Id.* at 749. The Federal Circuit concluded in *Zumerling*, and reiterated in this case, that it is to the Tucker Act that a court must look to find out what court possesses jurisdiction. Nothing in *Bowen* conflicts with that conclusion.

2. Petitioners also argue that the decision of the Federal Circuit in this case is in conflict with *Ward* v. *Brown*, 22 F.3d 516 (2d Cir. 1994). If *Ward* conflicts with any Federal Circuit decision, it is *Mitchell* v. *United States*, 930 F.2d 893 (Fed. Cir. 1991), not this case.

Neither *Ward* nor *Mitchell* involved the FLSA. Both were APA suits challenging adverse personnel actions, with ancillary monetary relief sought in the form of back pay. In *Mitchell*, the Federal Circuit held that a service member's suit for reinstatement and back pay could not be brought in district court pursuant to 28 U.S.C. 1331 and the APA. The court rejected the service member's reliance upon *Bowen*, observing that "[i]n *Bowen*, the Supreme Court itself distinguished the Claims Court's jurisdiction over back pay cases from jurisdiction over the Medicaid disallowance case." *Mitchell*, 930 F.2d at 896. In *Ward*, the Second Circuit held that the plaintiff could sue in district court under the APA to challenge a Department of Veterans Affairs decision removing her from her position as a nurse. As to the monetary relief, the court agreed that back pay was not available under the APA, but nonetheless held that plaintiff could seek back pay in the district court pursuant to the Back Pay Act, 5 U.S.C. 5596.

Mitchell and *Ward* involve the question whether APA challenges to removal actions are within the district courts' federal question jurisdiction even when the relief sought includes an ancillary claim for back pay, or whether all claims for back pay must be brought in a court possessing Tucker Act jurisdiction. That question, however, is not involved here. The monetary relief petitioners seek is not ancillary to an APA claim or to any other claim that would normally fall within the district court's jurisdiction. Here, the underlying cause of action is for an alleged monetary loss.[5] Jurisdiction to entertain claims of

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[5] Count II of the complaint in this case asserts an APA claim, but it is ancillary to the monetary claim asserted in

that kind is normally based upon the Tucker Act. The Second Circuit did not hold in *Ward* that alternative sources of jurisdiction are available for such claims. The holding of the court below that the Tucker Act is the exclusive source of jurisdiction for FLSA overtime claims therefore is not in conflict with the holding in *Ward*.

3. Petitioners erroneously attribute to the court below an acknowledgement that "its ruling also conflicts with a number of decisions (both before and after *Bowen*) that have found an independent basis for district court jurisdiction in 28 U.S.C. 1331 where a statute allows suit against the federal government 'in any court of competent jurisdiction.'" Pet. 8. The court of appeals did not acknowledge any such conflict, and no such conflict exists. The court of appeals noted that there is a "[d]ivergence of judicial opinion concerning the jurisdiction of monetary claims against the government *under various statutes*," Pet. App. 7a (emphasis added), but that it had "come upon no instances of circuit conflict in FLSA actions against the United States." *Ibid.*

Count I, rather than vice versa. Indeed, Count II challenges the validity of the OPM regulations in question only *to the extent* that they define the administrative exemption more broadly than do the DOL regulations concerning non-federal employees. Petitioners do not allege that the OPM regulations in fact do so. Moreover, this suit was brought on behalf of present and former customs inspectors and field national import specialists. Former occupants of those positions may seek retrospective monetary relief under Count I, but they lack standing to seek the prospective relief requested in Count II. Nor does it appear that Count II was meant to be brought on behalf of former Customs employees. For former employees, this case is exclusively a suit for monetary compensation, with no APA component at all.

Petitioners likewise cite no FLSA cases conflicting with the court of appeals' decision in this case. Petitioners do cite a number of cases finding 28 U.S.C. 1331 to be a source of jurisdiction of actions based upon a statute allowing suit against a federal governmental entity "in any court of competent jurisdiction," but those are cases interpreting the "sue-and-be-sued" clause in the National Housing Act, 12 U.S.C. 1702. Section 1702 provides in part that the Secretary of Housing and Urban Development may "sue and be sued in any court of competent jurisdiction, State or Federal." The language of 12 U.S.C. 1702 bears some similarity to that of 29 U.S.C. 216(b), which provides that "[a]n action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction * * *." There are, however, important differences between the two statutes.

Section 1702 deals exclusively with suits by or against one federal agency and uses "sue-and-be-sued" language that has long been recognized to signal a particular type of sovereign immunity waiver. See *Loeffler* v. *Frank*, 486 U.S. 549, 554-556 (1988); see also *United States* v. *Nordic Village*, 503 U.S. 30, 34 (1992). Section 216(b), by contrast, deals with suits against *any* employer subject to the FLSA and does not employ the key "sue-and-be-sued" language that has been thought to waive sovereign immunity in suits against a particular federal agency. Moreover, because the federal government is only one of the types of employers addressed in Section 216(b), the reference to "court of competent jurisdiction" takes on a different meaning than it would if Section

216(b) were limited to the federal government. For private employers and state or local employers, the term "court of competent jurisdiction" in Section 216(b) includes state courts and federal district courts. In a suit against the *federal government* pursuant to Section 216(b), however, there is no reason to construe the term "court of competent jurisdiction" as extending to courts lacking Tucker Act jurisdiction, and the FLSA cannot be viewed as a waiver of sovereign immunity independent of the Tucker Act.[6] As the district court observed:

> Given the fact that, with no reference to sovereign immunity, public agencies were added to the FLSA, a previously existing statute which did not address sovereign immunity, and the scant authority supporting [petitioners'] position, the

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[6] The opinion of the court of appeals contains a statement which, if taken out of context, could be construed to state that the FLSA itself is a waiver of sovereign immunity. In that statement, the court of appeals observed that, in its earlier decision in *Zumerling*, "[t]he court explained that the FLSA conferred the right to recover money from the United States, that is, the FLSA contained the requisite waiver of sovereign immunity," Pet. App. 5a. In *Zumerling* itself, however, the court stated that the waiver of sovereign immunity for FLSA claims was contained in the *Tucker Act*. *Zumerling*, 769 F.2d at 748. As the *Zumerling* court further explained, that waiver also depends upon the FLSA, because the waiver contained in the Tucker Act applies to FLSA suits only to the extent that the FLSA confers a substantive right to receive money from the government. "*Testan* draws a distinction between the law conferring a substantive right to receive money from the United States, and a law endowing a court with jurisdiction of suits to enforce that right, and *both* must be present." *Zumerling*, 769 F.2d at 749 (emphasis added); see *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980).

> Court cannot conclude that the intent of Congress, in enacting and amending the FLSA, was to waive sovereign immunity. Thus, the Court holds that the waiver of sovereign immunity applicable to [FLSA] claims is found in the Tucker Act.

Pet. App. 23a-24a.

4. Petitioners raise two additional arguments that concern not the correctness of the court of appeals' decision in this case, but the desirability of the result. Those arguments cannot overcome the "age-old rule that a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists," *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988). And even apart from that rule, neither of petitioners' arguments presents a sound reason for overturning the court of appeals' decision.

First, petitioners argue that the venue provisions applicable to Tucker Act suits may preclude plaintiffs residing in different districts from joining together to sue in a single forum outside of Washington, D.C., even when they bring claims that are within the district court's Tucker Act jurisdiction because they seek less than $10,000. That is so because, as the district court held in this case, Pet. App. 26a-29a, district court venue in Tucker Act cases is governed by 28 U.S.C. 1402(a), which provides that, except when the plaintiff is a corporation, actions pursuant to 28 U.S.C. 1346(a) may be prosecuted only "in the judicial district where the plaintiff resides." See *Parker* v. *King*, 935 F.2d 1174, 1176 (11th Cir. 1991), cert. denied, 505 U.S. 1229 (1993); *Brooks* v. *Weinberger*, 637 F. Supp. 22, 24 (D.D.C. 1986); *Davila* v. *Weinberger*, 600 F. Supp. 599, 602 (D.D.C. 1985).

According to petitioners, it would be undesirable to restrict the venue of FLSA cases in this manner. In applying 28 U.S.C. 1402(a) to this case, however, the district court noted the undesirable consequences of *not* restricting venue in this manner.[7] Petitioners did not appeal the district court's venue ruling, and the court of appeals did not discuss venue in its opinion. Thus, especially given the record presented in this case, the incidental venue consequences of the Federal Circuit's jurisdictional ruling are not a proper basis upon which to call that ruling into question.

Second, alluding to the fact that appellate review in Tucker Act cases is within the exclusive jurisdiction of the United States Court of Appeals for the Federal Circuit, 28 U.S.C. 1295, petitioners argue (Pet. 12) that "the purposes of the FLSA are ill-served by centralizing the appeals process." According to petitioners, the rationale for exclusive appellate jurisdiction does not apply to FLSA cases. Because the principles to be applied in this case are similar to those applied by other courts in private-sector FLSA cases, petitioners reason, "the Federal Circuit can develop no particular ability to provide definitive answers to FLSA questions." *Ibid.*

Petitioners' premise is flawed, because the FLSA contemplates a separate system of administration in the case of federal employment. See 29 U.S.C. 204(f). Even assuming, however, that there were merit to

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[7] "[T]he *Davila* court pointed out the danger of forum shopping which would exist in cases involving hundreds of plaintiffs from numerous jurisdictions if only one plaintiff satisfied the section 1402(a) residence requirement." Pet. App. 29a.

this contention, it is beside the point. The issue here is whether the court of appeals correctly decided that the Tucker Act is the exclusive source of *trial court* jurisdiction to entertain FLSA suits against the federal government, not whether the rationale for the Federal Circuit's exclusive *appellate* jurisdiction in Tucker Act cases specifically applies in full force to FLSA suits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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